AUG 2 19
HAROLD B. WILLEY

Supreme Court of the United States

October Term, 1954

No. 45 Misc.

LEONARD SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
LEONARD E. REISMAN
Assistant District Attorneys
Of Counsel

807 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3.

INDEX

PAGE

STATEMENT 1

THE TRIAL 2

THE MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL 4

A. As to the alleged insanity or incompetency of the witness Janson 4

1. The petitioner's evidence 5

2. The People's evidence 7

B. As to the alleged newly discovered evidence concerning the identity of the killer 9

QUESTIONS PRESENTED AND THE RESPONDENT'S POSITION 10

ARGUMENT — No federal questions were properly raised or are presented. And, in any event, there are no substantial federal questions 11

(1) As to the alleged insanity of the witness Janson 12

a. The question of deprivation of due process was not properly raised 12

b. There is no substantial federal question presented 13

(2) As to the allegedly improper receipt in evidence of the grand jury minutes on the motion for a new trial 15

PAGE

a. No federal question was raised or presented 15

b. There is no federal question involved..... 16

(3) As to the receipt in evidence, on the motion for a new trial, of the allegedly prejudicial newspaper clippings 18

a. No federal question was raised or is presented 19

b. There is no federal question 19

(4) As to the alleged inadequacy of the trial court's charge 20

a. No federal question was raised or is presented 20

b. There is no federal question 21

Supreme Court of the United States

October Term, 1954

No. 45 Misc.

LEONARD SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner was convicted of the crime of MURDER IN THE FIRST DEGREE (Penal Law §1044, subd. 1) by a judgment of the Court of General Sessions, New York County, rendered June 24, 1953, and was sentenced to death (4188-9).* Prior to sentence, the petitioner moved to set aside the verdict and for a new trial on the ground of newly discovered evidence. A hearing was held and the motion was denied with an opinion (4111-28).

The judgment of conviction, which included the order denying the motion for a new trial, was affirmed, without opinion, by the Court of Appeals (306 N. Y. 863[1]; motion

* References, unless otherwise indicated, are to folios of the printed record.

[1] The following statement accompanied the affirmance by the Court of Appeals: *"People, &c., res.* v. *Salemi, ap.*—Judgment of conviction affirmed. No opinion. All concur except Lewis, Ch. J., Desmond, and Van Voorhis, J. J., who dissent and vote for reversal and a new trial on the ground that the Court's charge did not 'marshal the evidence' as required by *People, &c.*, v. *Odell* (230 N. Y. 481)."

for reargument denied 306 N. Y. 946; motion to amend remittitur denied 306 N. Y. 946; motion for reargument denied 306 N. Y. 978).

The Trial

The petitioner was tried on an indictment for Murder in the First Degree which charged that, on or about February 26, 1952, with malice aforethought, he shot one Walter Forlenza with a pistol, causing his death the following day (7-9).

The evidence established that, in the early evening of February 26, 1952, Walter Forlenza was fatally shot by the petitioner as the deceased was sitting in a dining room in the rear of a bar and grill in New York City and County. The petitioner, who had apparently entered the tavern a few minutes before the crime, stood briefly at the bar in front of the establishment and then went back into the dining room to perpetrate the killing. After firing two shots into the deceased's head, he ran back through the bar room and made his escape, remaining unapprehended for about ten weeks.

Proof of the defendant's guilt came, in large part, from two witnesses who were present in the saloon when the crime occurred, each of whom knew the defendant by sight. One of these witnesses was Paul Janson, a patron of the bar for about seven years (295, 297). He testified that, on the day of the shooting, he was standing at the bar drinking beer and watching television when he noticed the petitioner alongside of him (298-301, 304, 351-3, 411-23, 516-8). About five minutes later, he heard two shots from

the dining room in the rear and turned to see the petitioner "leaning over a table looking at something" (305-6, 312-3, 353-4). Thereafter, the petitioner, who had been holding a gun, ran the full length of the establishment, passing Janson on the way and pocketing his gun as he left (316-8). Looking back into the dining room again, Janson saw a man (the deceased Forlenza) "topple off" a chair and fall to the floor (318-21). Janson himself then departed and went back to work (321).

The other witness who was present in the bar on the evening of the fatal shooting was a bartender and part owner of the establishment. He testified that he saw the petitioner and Janson standing next to each other at the bar and also observed the deceased seated at a table in the dining room (184-98). A few minutes later, while he was in the kitchen, he heard the shots and entered the dining room and observed the deceased falling from his chair to the floor (199-206).

In addition, there was evidence of a dying declaration made by the deceased about three and a half hours before his death, in which he declared that it was the petitioner who had shot him as a result of an argument (682-3, 683-4, 724-6). Finally, testimony was adduced to the effect that ten weeks of police investigation, commencing immediately after the shooting, had failed to locate the defendant (875-84, 894-7, 906, 939-43, 947).

As a defense to the charge, the petitioner advanced an alibi, which rested chiefly upon the testimony of two witnesses who placed him at or near a restaurant in another county at the time of the crime.

The Motion to Set Aside the Verdict and for a New Trial

Prior to sentence, the petitioner made a motion to set aside the verdict and for a new trial on the ground of newly discovered evidence, and a hearing was held on that motion. The motion had two distinct and unrelated phases: (1) that the witness Janson was incompetent at the time he testified; and (2) that new evidence had been discovered—three witnesses having been found after the petitioner's conviction who claimed to have information supporting his claim that he was innocent.

We treat below the motion for a new trial in each of its two phases separately.

A. As to the alleged insanity or incompetency of the witness Janson

The first phase was based upon information allegedly discovered by the defense after the verdict, that the People's witness Janson, who had identified the petitioner as the killer, had, while confined as a material witness in a prison during the trial, rammed his head into some iron bars in a suicide attempt two days before he took the stand. In addition, the day after the conclusion of the trial, Janson was committed for observation as to his mental condition, was diagnosed as being psychotic, and was thereafter sent to a state hospital for treatment (1936-41, 1952, 1954). On the basis of these facts, the petitioner contended that Janson was insane at the time of his testimony and, hence, incompetent as a witness (1801-5).

1. The petitioner's evidence

Dr. Leonard Cammer, a psychiatrist, prepared an affidavit in which he stated that he had read Janson's trial testimony, which he found to be "contradictory" in nature, and had examined abstracts of the records of the hospitals (wherein Janson had been examined and treated) relating to his background history, including his attempt to commit suicide while confined as a material witness (1875 *et seq.;* see Exhs. B, C, on motion). Based upon the foregoing material and information, Dr. Cammer concluded that Jansen "was in an abnormal state of mind at the time he testified," and that he was "not competent to testify in Court on any matter on November 13th and November 14th, 1952" (1889-93; also 2164-5).

At the hearing on the motion, Dr. Cammer acknowledged that he had never personally examined Janson, and, in fact, had never even seen him (2040, 2163-4). His opinion as to his mental condition was based solely on the material to which he referred in his affidavit (2039-43, 2164-5). Almost all of the information contained in the hospital records was, of course, the result of interviews with Janson when he was concededly psychotic (2094-5).

According to the witness, persons who attempt suicide usually do so to expiate guilt feelings, which Janson had, although the desire for self-destruction could result from excessive fear (2080-1, 2084, 2119-20, 2132). The doctor acknowledged that Janson, who knew that another eye witness in the case had been strangled, might have had much to fear and that such would be a normal reaction (2111-4). However, in Janson's case, the psychiatrist said,

that would have been merely a contributory factor and his mental condition stemmed principally from his own personality development and paranoid delusions, which pointed to a "disturbance that existed long before he ever set foot in the bar and grill" (2091-3, 2097-8, 2161-3).

Dr. Cammer stated that a psychotic person might, "By coincidence," tell the truth (2119, 2128, 2140) but that Janson's testimony, including his identification of the petitioner, could not be "reliable" (2128-9, 2140), and that he was "incapable" of telling the objective truth at the time he testified (2130-2, 2180-1), even though his account might have actually been in accord with the objective facts (2130-1).

Various detectives who had been assigned to guard Janson before and during the trial testified as to his behavior while a material witness in a local hotel. Indicating that at first he was "all right" (Whelan 2309) and that, on one occasion, he went to a bowling alley and helped keep score while the officers bowled (Healy 2284-6, 2291-8; also Janson 3163-6), they stated that, about November 18th or 19th (after he had testified at the trial), he began to slacken off on his eating and smoking (Mengrone 2232, 2239-41, 2243-4, 2257-8; Whelan 2309-10). When he finally refused food, he was taken to the District Attorney's Office on November 21, 1952, examined by Dr. Lichtenstein, a psychiatrist employed by that Office, and sent to a hospital (Mengrone 2232, 2235, 2238-41, 2258-62; Whelan 2309-12).

Finally, the petitioner's trial counsel—an attorney with twenty-four years experience in practicing criminal law

(2887)—testified that he recalled Janson stating at the trial that he had deliberately rammed his head into some bars and that he had said that he "blew * * * [his] top." (see 326, 480-4, 623-4; 2869-77). Although indicating that he had no idea this was a suicide attempt, the attorney reopened the subject the following day when Janson resumed the witness stand and questioned him as to whether he had ever been treated by a psychiatrist or been confined in a mental institution (480-4, 623-4, 2869-77).

Saying that he had been misled by the court's questioning on the subject and by Janson's replies on the stand, counsel stated that he did not learn that Janson's action was a suicide attempt until some months later when he was shown the hospital records and the official report of the incident (2874-7, 2893-4, 2897-8, 2934-5, 2938-9). He conceded, however, that, after hearing Janson testify concerning the self-inflicted injuries, he made no effort to obtain the jail records nor had he communicated with anyone at the jail in order to find out precisely what had happened (2887-92, 2903-4, 2940).

2. The People's evidence

Paul Janson testified that, after another witness in the case, a bartender, had been found strangled, he had been committed as a material witness and had been "only too glad" that it was done (2962-6). As the trial date approached, Janson, owing to his knowledge of the bartender's fate, was obsessed by "fear and terror" of retaliation if he appeared as a witness and identified the petitioner, and he began to get edgy and nervous (2968, 2971, 3001-2, 3098-100, 3386). Finally, shortly before he was to

testify, he rammed his head into some bars at the jail in an attempt to kill or injure himself so that he could not be called as a witness (see 326, 480-4; 2967-72, 3001, 3037-9, 3109). When the attempt failed, he "snapped out of it" and decided that he "would do as I said I was going to do, tell the truth and nothing but the truth" (3147).

Janson recalled testifying at the trial, and stated that his answers there were truthful (2973-8). He reiterated his previous trial testimony identifying the petitioner as the man he had seen in the bar and grill with a gun in his hand (2975-8, 2981-2, 3006, 3110-3, 3119-20).

Janson again acknowledged—as he had at the trial (626-44)—that he had concealed his knowledge of the identity of the killer until July 23, 1952, when, after talking with his wife and daughter, he finally told the whole truth and picked out a picture of the petitioner (3002-6, 3047-58, 3117). His secretiveness up to that time resulted from fear of injury or murder of himself or some member of his family (3061-2, 3383-4). His fear increased after he identified the petitioner as the killer (3384-6). Indeed, he still was fearful of his safety and was still under police guard (3071-3, 3097, 3394).

Dr. Perry M. Lichtenstein, a psychiatrist attached to the District Attorney's Office, testified that, on November 21, 1952—after the trial—he had examined the witness Janson and concluded that he was at that time psychotic and in need of psychiatric care, although he could not then tell how long Janson had been in that condition (3427-8, 3431-4, 3456, 3524-5, 3534-5, 3546-67). As a result, he wrote a letter to Bellevue Hospital requesting his admission to the Psychiatric Division (3433, 3544-5).

The psychiatrist further testified that he thereafter read Janson's trial testimony and found his answers responsive, relevant and coherent, and nothing to indicate that the witness had behaved in any unusual manner (3434, 3437). The doctor's opinion, based in part on this testimony, was that at the time he testified, Janson was not psychotic or insane, but rather was in contact with reality (3435-43, 3456-7, 3763-5).

Dr. Lichenstein's diagnosis of Janson's mental condition on November 21st was that he was suffering from a "reactive depression of an involutional type" occurring at a certain time of life when Janson was under "great stress and strain," which could have been brought on as a result of fear (3454-6, 3704-7). However, he believed that this psychosis did not manifest itself during Janson's trial testimony (3456-7).

The psychiatrist disagreed with Dr. Cammer's opinion that Janson was psychotic when he testified and with his explanation of Janson's motivations, stating that Dr. Cammer's theory was "inconceivable" under the circumstances (3459-62, 3921-2).

B. As to the alleged newly discovered evidence concerning the identity of the killer

This phase of the motion revolved about the affidavits and testimony of three persons who were allegedly in the bar and grill on the night of the crime, two of whom testified they had observed the shooting and that the defendant was not the killer (Russo 1907-11; Cusimano 2721-2, 2775-8, 2797).

No purpose would be served in recounting the testimony of these two witnesses in detail (see *infra,* pp. 18-19). Suffice it to state that they testified that they did not come forward for fear of "reprisals," although they never identified the killer, and that they decided to make themselves available as witnesses as a result of a chance meeting with the petitioner's brother in December, 1952, some ten months after the killing and five months after the arrest of the petitioner (Russo 1911-3, 2519-20, 2554-6, 2582-3; Cusimano 2816-9).

Questions Presented and the Respondent's Position

The petitioner contends that he was deprived of due process of law in four major particulars (brief, pp. 6-7):

(1) That the trial court received in evidence against him the testimony of an allegedly insane and incompetent witness; and that the court erroneously denied his motion for a new trial after hearing evidence on the subject of the witness' mental condition;

(2) That, on the motion for a new trial, the trial court erroneously received in evidence the testimony of witnesses before the grand jury;

(3) That, on the motion for a new trial, the trial court erroneously received in evidence certain allegedly prejudicial newspaper articles; and

(4) That, on the trial, the trial court erred in failing to marshal the evidence in the case.

The respondent's position is that, in each of the above particulars, no federal question was timely raised or properly presented, that no claim of deprivation of due process was made until motion for reargument of the appeal after affirmance of the judgment by the New York Court of Appeals, and that, in any event, no substantial federal question is involved.

ARGUMENT

No federal questions were properly raised or are presented. And, in any event, there are no substantial federal questions [answering the petitioner's brief, pp. 13-25].

It is well established that this Court does not have, and will not assume, jurisdiction to review a judgment of the highest court of a state where the alleged federal question has not properly been raised, presented and passed upon in the state court. A federal question is not properly raised for the first time upon a motion for reargument in the state court. Nor is a federal question deemed to have been passed upon where the state court delivers no opinion, unless it is clear that the court actually entertained and passed upon such question, or that such was necessary to its decision [see *Stembridge* v. *Georgia* (1951) 343 U. S. 541, 546-548; *Herndon* v. *Georgia* (1934) 295 U. S. 441, 443; *Waters-Pierce Oil Co.* v. *Texas* (1908) 212 U. S. 112, 118; *McCorquodale* v. *Texas* (1908) 211 U. S. 432, 437; *Thomas* v. *Iowa* (1907) 209 U. S. 258, 262-263]. It is likewise well settled that the due process clause of the Fourteenth Amendment does not enable this Court to review mere

errors of state law [*Buchalter* v. *New York* (1942) 319 U. S. 427, 430, 431; and cases cited in footnote 6, p. 430]. Bearing these settled principles in mind, it is manifest that the instant petition for certiorari must be denied.

(1) *As to the alleged insanity of the witness Janson*

a. The question of deprivation of due process was not properly raised.

The defendant alleges that he was deprived of due process of law by reason of the trial court's receiving in evidence against him the testimony of the "insane witness Janson" (Petition, pp. 6, 13). To begin with, there is no definitive proof that Janson was, in fact, insane at the time he testified at the trial, something which the petitioner now assumes to be established; the psychiatric testimony given on the motion for the new trial was in conflict on the subject; and the trial court, on the basis of all the evidence submitted on the motion for the new trial, found that Janson was not insane or incompetent at the time he testified, a determination which rested squarely within its discretionary powers [see *People* v. *Sprague* (1916) 217 N. Y. 373, 380; *People* v. *Patrick* (1905) 182 N. Y. 131, 177-178, rearg. den. 183 N. Y. 52; *People* v. *Koepping* (1904) 178 N. Y. 247, 253; *People* v. *Buchanan* (1895) 145 N. Y. 1, 30-32]. Be that as it may, no question is raised for review in this Court.

In contending that the point was raised in the trial and appellate courts and preserved for review here, the petitioner alludes to a certain passage in the affidavit of his counsel on the motion for a new trial, and to the fact that the alleged deprivation of due process was urged on

his motions in the Court of Appeals for reargument of the appeal and amendment of the remittitur (Petition, p. 13).

The passage referred to in the affidavit is couched in the most "vague and inferential" terms, and is manifestly insufficient to raise any question involving due process [see *Thomas* v. *Iowa, supra,* 209 U. S. 258, 262-263]. Even more significant, however, is the fact that, upon appeal to the Court of Appeals, while the issue of Janson's mental condition was raised as an argument for reversal and for the granting of a new trial, there was no mention—much less a claim—made by the petitioner that he had been deprived of due process of law.

In short, it was not until after judgment was rendered in the Court of Appeals that the petitioner advanced his present claim. As this Court has frequently ruled, this is too late to warrant this Court in assuming jurisdiction, particularly since the Court of Appeals obviously decided the case upon state grounds in the first instance; denied, without opinion, the petitioner's motion for reargument of the appeal on the grounds here urged; and specifically rejected the petitioner's application to amend its remittitur to recite that federal questions had been presented or passed upon, or were in any way involved in its decision.

b. There is no substantial federal question presented.

Apart from the aforementioned jurisdictional defects, there is no basis for issuance of the writ.

As previously indicated in this brief (*supra,* pp. 7 and 8), the witness Janson testified at the trial, under cross-examination, that he had "deliberately" and "purposely"

rammed his head into some bars at the prison where he was being detained. The petitioner's counsel had every opportunity to explore this incident to the fullest extent, but avoided pursuing the matter—obviously, we submit, for the patent reasons that to do so might have reacted most unfavorably to his client.

At this point in the trial, apart from the suicide attempt itself, there was nothing to indicate that Janson was mentally abnormal in any way. He was completely oriented, and his testimony was clear and coherent. It was not until after he had testified that he began to behave in an unusual manner, and not until after the jury verdict was rendered that he was determined to be psychotic. Prior to judgment, the defense was informed of this development, and judgment was postponed pending Janson's recovery to allow the defense to take whatever steps they chose in the light of these events.

The motion for a new trial resulted and a full-scale hearing was held, which lasted much longer than the actual trial. Far from being denied due process, the petitioner was accorded it in every sense of the term.

The petitioner's claim of a denial of due process is based upon the assumption that Janson was—both in fact and law—insane and incompetent at the time he testified at the trial, and that the jury was not permitted to pass upon the question of his mental condition or competency. This overlooks the salient fact that no question of his competency was raised and that, had there been, there would have been nothing for the jury to consider except that Janson had deliberately inflicted injury upon himself,

which—regardless of what the petitioner may say as to his knowledge of the true nature of Janson's actions—any reasonable person would recognize as a suicide attempt. None of the evidence to which the petitioner refers in his brief could have been presented, such as the testimony of his expert witness at the new trial hearing, which was based in the main on the hospital records subsequently compiled while Janson was concededly insane, and the hospital entries themselves, which the petitioner presently stresses (Petition, pp. 10-12, 20-21).

There can, therefore, be no question of denial of due process at the trial and, accordingly, any such claim must be predicated on what occurred on the motion for a new trial. That, as seen, was conducted in the fullest manner possible, and was heard and decided in accordance with proper state procedure, which was reviewed and affirmed by the Court of Appeals. Indeed, even the dissenting judges of that court did not indicate that the denial of the petitioner's motion for a new trial was improper.

For the above reasons, we submit that no substantial federal question is presented with respect to this contention.

(2) *As to the allegedly improper receipt in evidence of the grand jury minutes on the motion for a new trial*

a. No federal question was raised or presented.

On the motion for a new trial, the entire grand jury minutes were received in evidence (2942-61; R. pp. 1412 *et seq.*). At the conclusion of the trial itself, after the

verdict, the trial court, in response to a query from one of the jurors, had had the grand jury testimony of one Basilio Pauitta, the deceased bartender at the Belvedere Bar & Grill, read into the record (1765-72). Pauitta, who had named the petitioner as the killer in his grand jury testimony, had been found strangled about two weeks after he had testified (1771-2; R. p. 1412).

While objection was made to Pauitta's grand jury evidence being made part of the record (1776-7) and, on the motion for a new trial, to a portion of the balance of the grand jury minutes being received in evidence (2942-61), no claim was made that this constituted a violation of due process.

Moreover, on the appeal to the Court of Appeals, the matter was not even mentioned in the petitioner's main brief.

It was not until the petitioner moved for reargument of the appeal or, in the alternative, for amendment of the remittitur, that he claimed—for the first time—that the making of the grand jury testimony a part of the record constituted a violation of due process.

Clearly, any such federal question—if, indeed, it is—was not properly or timely made so as to give this Court jurisdiction to review.

b. There is no federal question involved.

As we have pointed out, the grand jury testimony of Pauitta—as well as the balance of the grand jury minutes—was not before the trial jury prior to verdict. Accord-

ingly, there can be no possible federal question of a violation of due process upon the trial of the petitioner on the issue of his guilt or innocence, as determined by the trial jury.

Nor does such a question arise by reason of making the grand jury minutes a part of the record on the motion for a new trial. Examination of the grand jury minutes—and comparison thereof with the trial record—reveals nothing prejudicial in any way to the petitioner. The grand jury witnesses—apart from Pauitta—who did not testify at the trial, gave no testimony implicating the petitioner in the crime.

Pauitta's grand jury testimony, as we have said, was not made known to the trial jury until after verdict, and, accordingly, could not have influenced their deliberations in any way. Although he does not say so, the petitioner evidently feels that the testimony prejudiced him in the eyes of judges of the Court of Appeals. Apart from that being most unlikely, it seems especially significant that the petitioner did not even raise the point on the original appeal, which indicates that he did not then deem it prejudicial. Raising it for the first time on the motion for reargument strongly suggests that the petitioner is belatedly grasping at straws having no real substance. Certainly, no federal question of due process is raised by the record.

(3) *As to the receipt in evidence, on the motion for a new trial, of the allegedly prejudicial newspaper clippings*

On the motion for a new trial, the petitioner produced three witnesses, whose testimony was supposedly "newly discovered", to testify that he was not the killer. One of these, George Russo, filed an affidavit stating that he had been at the bar on the night of the shooting, that he knew the petitioner, and that the petitioner was not the man who had done the shooting (1900-14). Russo also claimed that he had not come forward with his evidence until after the petitioner's conviction because he had not known of the petitioner's indictment and trial and, while he had known of the petitioner's involvement in the case by reason of reading newspaper articles in early July, 1952, had believed that the petitioner's arrest was not of any consequence (1911-4).

Called as a witness on the hearing of the motion for a new trial, Russo was cross-examined about the newspaper articles that he had read relating to the violent death of the bartender witness, Pauitta, which, he claimed, was the first indication he had had that the petitioner was in any way involved in the case (2443-7, 2497-8, 2503, 2526-32, 2538-9). Inquiry was made as to why, after seeing these articles, he had not then made known that the petitioner was innocent of wrongdoing (2499-502, 2509-18, 2540-4). The three articles—which he acknowledged having seen and read (2532-8, 2569-71)—were marked in evidence (2664-9; Exhs. 2, 3, 4, on motion) and the petitioner now contends that the receipt of these as exhibits was prejudicial and violated his fundamental rights.

a. No federal question was raised or is presented.

The propriety of Russo's cross-examination with respect to the newspaper articles was never questioned. Indeed, the marking of them in evidence, upon his redirect testimony, was not seriously contested (2664-9), and only upon the ground that Russo had said he had read but one of them (2668-9; but see 2532-8, 2569-71). No claim whatever was made that the reception in evidence of the articles violated any of the petitioner's constitutional rights.

So insignificant, in fact, were these articles—which, incidentally, were not before the trial jury—that the petitioner made no claim in the appellate court that he was at all prejudiced by their reception, much less that a deprivation of a fundamental federal right was involved. At the risk of being overly repetitious we again note that only after affirmance of the judgment by the Court of Appeals did the petitioner, on motion for reargument, tardily claim that his constitutional rights were infringed. This, as we have pointed out, comes too late to raise a federal question of which this Court will take cognizance.

b. There is no federal question.

Quite apart from the above, there is no federal question of due process. It was perfectly proper—as indicated by the absence of even so much as an objection—to cross-examine Russo concerning his knowledge, as of early July, 1952, of the petitioner's involvement in the crime of which Russo was seeking rather late in the game to absolve him. If, as Russo asserted, he knew in February, 1952, that the petitioner was not the killer, then it became manifestly

important to determine why, after learning in July that the petitioner was being held for the crime, he, Russo, did not then come forward with his exculpatory information. Contrary to Russo's claim that he believed that the petitioner was merely being held on suspicion, the newspaper articles served to show that Russo must have known that the petitioner had actually been indicted and charged with the killing. Therefore, reception of the articles in evidence on the motion for a new trial was clearly proper and correct.

(4) *As to the alleged inadequacy of the trial court's charge*

The petitioner contends that the trial court failed to review the evidence in charging the jury and that he was thereby deprived of his fundamental rights without due process of law.

a. No federal question was raised or is presented.

There was no exception taken to the Court's charge on the ground that the evidence had not been fully reviewed. Although it was argued on the appeal to the Court of Appeals that the charge was inadequate and erroneous in this respect, no claim was made that a violation of due process resulted. That claim was first advanced on the motion for a reargument of the appeal which, as seen, comes too late to raise a federal question.

b. There is no federal question.

Even assuming that timely objection had been made in the State courts, there is no federal question for review here. In the very case from which the petitioner quotes (brief, p. 24)—*People* v. *Buchalter* (1942) 289 N. Y. 181, 223—to support his claim that he was deprived of a fundamental right, the Court of Appeals affirmed the judgment, and this Court, in affirming the action of the Court of Appeals [*Buchalter* v. *New York* (1942) 319 U. S. 427, at page 431], stated that

> "* * * the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

Accordingly, no federal question is presented.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
LEONARD E. REISMAN
Assistant District Attorneys
Of Counsel

July, 1954